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IN THE
COURT OF APPEALS OF INDIANA

JAMES BULLITT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0604-CR-314
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patricia J. Gifford, Judge
The Honorable Steven Rubick, Commissioner
Cause No. 49G04-0506-FB-732

March 20, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, James Bullitt (Bullitt), appeals his conviction for Count I, burglary, a Class B felony, Ind. Code § 35-43-2-1; Count II, theft, a Class D felony, I.C. § 35-43-4-2; and Count III, habitual offender, I.C. § 35-50-2-8.

We affirm.

ISSUES

Bullitt raises four issues on appeal, which we restate as follows:

(1) Whether the trial court abused its discretion by admitting evidence seized after Bullitt's detention by the police;

(2) Whether the trial court violated Bullitt's right to due process when it detained, admonished, and released a prospective juror;

(3) Whether Bullitt's convictions for burglary and theft violate his protection against double jeopardy; and

(4) Whether the evidence is sufficient to sustain the trial court's finding that Bullitt was a habitual offender.

FACTS AND PROCEDURAL HISTORY

Justin Leuer (Leuer) resides by himself in Marion County, Indiana. On June 9, 2005, he came home at approximately 9 a.m. to find a panel missing from his door, a broken window, and the door, that has a deadbolt at the base which can only be opened from the inside, unlocked. Once inside, he discovered two jugs of change, a credit card issued to him, a money clip with money in it, and a Tag Heuer watch were missing.

Leuer called the police who were able to find a latent fingerprint on a broken piece of glass and match it to Bullitt. Leuer did not know Bullitt.

On June 14, 2005, Indianapolis Police Officer Leonard Nelson (Officer Nelson) was called to the scene of a different burglary. The description he received regarding the suspects' attire, number of suspects, and the direction in which they fled was vague. However, moments after receiving the dispatch, Officer Nelson observed a man, later identified as Bullitt, riding a bike, while another man walked along side him, a few blocks from the burglary. Officer Nelson waved the two to the side of the road; Bullitt complied and the other individual ran from the scene. Officer Nelson asked Bullitt to identify himself. Bullitt twice gave Officer Nelson a false name. Officer Nelson placed Bullitt in handcuffs, found a credit card with Leuer's name on it, and subsequently learned of a warrant for Bullitt. Officer Nelson placed Bullitt under arrest, searched him further and found a Tag Heuer watch. Leuer later identified the credit card and watch as being his.

On June 16, 2005, the State filed an Information charging Bullitt with Count I, burglary, a Class B felony, I.C. 35-43-2-1, and Count II, theft, a Class D felony, I.C. § 35-43-4-2. The State later amended the Information to include Count III, habitual offender, I.C. § 35-50-2-8. On August 25, 2005, Bullitt filed a Motion to Suppress the items seized following his detention by Officer Nelson. After hearing evidence, the trial court denied Bullitt's Motion.

On February 16, 2006, a jury trial began. A number of prospective jurors were brought to the courtroom and *voir dire* was conducted. During *voir dire*, a prospective

juror indicated she could not be partial, had personal responsibilities, did not wish to be there, and would not listen to the evidence. Due to the prospective juror's "intemperate attitude" she was removed to a holding cell until a jury and alternates had been chosen. (Transcript p. 311). Outside the presence of the jury, the prospective juror was brought back into the courtroom, admonished by the trial court, and released. Then, at the close of evidence, Bullitt was found guilty of both Count I, burglary, and Count II, theft. Bullitt waived a jury trial for Count III, habitual offender, and was subsequently adjudicated to be a habitual offender by the trial court.

The trial court sentenced Bullitt to twenty years for Count I enhanced by ten years for the habitual offender adjudication, and three years for Count II to be served concurrently.

Bullitt now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Admission of Evidence*

Bullitt first argues the trial court erred when it denied his Motion to Suppress. Specifically, Bullitt contends the requisite level of reasonable suspicion of criminal activity was not present to support Officer Nelson's investigative detention.

Bullitt is challenging the admission of the evidence procured during Officer Nelson's search following his conviction rather than in an interlocutory appeal. Thus, the issue is more appropriately whether the trial court abused its discretion by admitting the evidence at trial. *Bentley v. State*, 846 N.E.2d 300, 304 (Ind. Ct. App. 2006), *trans. denied* (citing *Washington v. State*, 784 N.E.2d 584, 587 (Ind. Ct. App. 2003)). A trial

court has broad discretion in ruling on the admissibility of evidence. *Bentley*, 846 N.E.2d at 304. Accordingly, we will reverse a trial court's ruling on the admissibility of evidence only when the trial court abuses its discretion. *Id.* An abuse of discretion involves a decision that is clearly against the logic and effect of the facts and circumstances before the court. *Id.*

As recently reiterated by this court:

> Not all police-citizen encounters implicate the Fourth Amendment. *See, e.g., Terry v. Ohio*, 392 U.S. 1, 19 n. 16 (1968) ("Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude a 'seizure' has occurred."); *see also Molino v. State*, 546 N.E.2d 1216, 1218 (Ind. 1989). A seizure does not occur, for example, simply because a police officer approaches a person, asks a question, or requests identification. *Florida v. Bostick*, 501 U.S. 429, 434 (1991); *see also Sellmer v. State*, 842 N.E.2d 358, 360 (Ind. 2006) (recognizing that a person is not seized within the meaning of the Fourth Amendment when police officers merely approach an individual and ask if the individual is willing to answer questions). Instead, a person is seized for Fourth Amendment purposes when, considering all the surrounding circumstances, the police conduct "would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." *Florida v. Royer*, 460 U.S. 491, 497 (1983).

Bentley, 846 N.E.2d at 305. Essentially, we have decided that not "every street encounter between a citizen and the police is a seizure." *Id.* (quoting *Overstreet v. State*, 724 N.E.2d 661, 664 (Ind. Ct. App. 2000), *reh'g denied*, *trans. denied*).

Here, after receiving an extremely vague description of possible suspects, Officer Nelson observed a man, later identified as Bullitt, riding a bicycle and another man walking next to him. The two were not traveling at an unusual rate of speed. When Officer Nelson spotted the two men he waved them to the side of the road. Bullitt's

companion fled on foot. Bullitt followed Officer Nelson's instruction and stopped on the side of the road. Officer Nelson was the only officer present, did not have the siren or lights on his vehicle activated, nor did he have his weapon drawn, use a harsh tone, or touch Bullitt. *See Payne v. State*, 854 N.E.2d 1199, 1203 (Ind. Ct. App. 2006), *trans. denied* ("Factors to be considered in determining whether a reasonable person would believe he was free to leave include: (1) the threatening presence of several officers, (2) the display of a weapon by an officer, (3) the physical touching of the person, or (4) the use of language or tone of voice indicating that compliance with the officer's request might be compelled."). Thus, leaving a reasonable person to believe he was free to leave or terminate the encounter.

Officer Nelson asked Bullitt to identify himself and after receiving two false names from Bullitt, Officer Nelson handcuffed Bullitt and searched him. He found a credit card bearing Leuer's name on Bullitt's person. Believing the name on the card to be Bullitt's true identity, Officer Nelson ran Leuer's name through the police database. Officer Nelson learned Leuer was the victim of a burglary a few weeks prior and there was a warrant for Bullitt. Officer Nelson further searched Bullitt after placing him under arrest and found a Tag Heuer watch on Bullitt's person. Leuer came to where Officer Nelson had Bullitt detained and identified the credit card and watch as being his.

In *Terry v. Ohio*, 392 U.S. 1, 30, (1968), the Supreme Court held that an officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when, based on a totality of the circumstances, the officer has a reasonable, articulable suspicion that criminal activity is afoot. A *Terry* stop is a lesser intrusion on the person

than an arrest and may include a request to see identification and inquiry necessary to confirm or dispel the officer's suspicions. *Bentley*, 846 N.E.2d at 307 (quoting *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 185-89 (2004), *reh'g denied*). However, as the Supreme Court has recognized, "[t]he concept of reasonable suspicion, like probable cause, is not readily, or even usefully, reduced to a neat set of legal rules." *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (citations omitted). Rather, in evaluating the legality of a *Terry* stop, we must consider the totality of the circumstances. *Bentley*, 846 N.E.2d at 307.

In that vein, Officer Nelson knew criminal activity was afoot; he was in a high crime area; within seconds of receiving a dispatch regarding possible suspects, Bullitt and his friend came into view; Bullitt's counterpart fled when asked to step to the side of the road; and Bullitt provided two false names to him. Officer Nelson's collective knowledge of the entire situation thus provided him with the requisite reasonable suspicion to detain Bullitt and acquire his identification. Therefore, we conclude that the trial court did not abuse its discretion by admitting the evidence at trial. *See id.* at 304.

II. *Prospective Juror*

Next, Bullitt contends his Sixth and Fourteenth Amendment rights of the United States Constitutional were violated when the trial court removed prospective juror Hughes from the courtroom during *voir dire*. Bullitt claims he had "a right to a jury composed of persons who felt free to answer truthfully during [*voir dire*]." (Appellant's Br. p. 12). Furthermore, he argues the trial court's error was fundamental because it was blatant and denied him his fundamental rights to due process. We do not agree.

Trial courts have broad discretionary power to regulate the form and substance of *voir dire*. *Perryman v. State*, 830 N.E.2d 1005, 1007-1008 (Ind. Ct. App. 2005). The decision of the trial court will be reversed only if there is a showing of an abuse of discretion and a denial of a fair trial. *Logan v. State*, 729 N.E.2d 125, 133 (Ind. 2000). This will usually require a showing by the defendant that he was in some way prejudiced by the *voir dire*. *Id.* However, Bullitt not only failed to present evidence of the resulting prejudice he experienced due to prospective juror Hughes' removal, but failed to object at trial to prospective juror Hughes' removal as well. Thus, he must show fundamental error. *See Black v. State*, 829 N.E.2d 607, 610 (Ind. Ct. App. 2005).

In determining whether fundamental error occurred with regard to *voir dire*, we observe that "[t]he purpose of [*voir dire*] is to determine whether a prospective juror can render a fair and impartial verdict in accordance with the law and the evidence." *Id.* (quoting *Joyner v. State*, 736 N.E.2d 232, 237 (Ind. 2000)). The right to an impartial jury is guaranteed by Article I, § 13 of the Indiana Constitution, and is an essential element of due process. *Black v. State*, 829 N.E.2d at 610.

Bullitt simply argues he "could not have received a fair trial because the trial court unconstitutionally chilled the pool of jurors from giving honest responses to [*voir dire*] questions before the case had even begun." (Appellant's Br. p. 19). We do not agree with Bullitt's weak argument. Rather, we find the trial court acted in a professional and prudent manner. First, the trial court questioned prospective juror Hughes regarding her disdain for the legal process, including selecting a panel of jurors. Then, the trial court had prospective juror Hughes removed from the courtroom so a jury could be selected

without further interruption. And finally, after returning prospective juror Hughes to the courtroom outside the presence of the seated jury, the trial court reprimanded her. Our review of the record does not indicate the trial court impeded either party's ability to "determine whether a prospective juror [could] render a fair and impartial verdict in accordance with the law and the evidence." *See Black v. State*, 829 N.E.2d at 610.

III. *Double Jeopardy*

Bullitt next asserts the trial court violated double jeopardy principles when it entered judgment of conviction on both the burglary and theft guilty verdicts. Specifically, Bullitt argues (1) both the burglary and the theft arose from the same set of circumstances, and (2) the theft is a lesser-included offense of the burglary. We disagree.

In *Richardson v. State*, 717 N.E.2d 32, 49 (Ind. 1999), our Supreme Court established a two-part test for analyzing double jeopardy claims. Specifically, it held that "two or more offenses are the 'same offense' in violation of Article I, Section 14 of the Indiana Constitution, if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense." *Id.*

The objective of the statutory elements test is to determine whether the essential elements of separate statutory crimes charged could be established hypothetically. *Merriweather v. State*, 778 N.E.2d 449, 453 (Ind. Ct. App. 2002). Comparing the essential statutory elements of one charged offense with the essential statutory elements

of the other charged offense identifies the charged offenses. *Id.* We review the relevant statutes and the charging instruments and consider the essential statutory elements to determine the identity of the offense charged, but do not evaluate the manner or means by which the offenses are alleged to have been committed, unless the manner or means comprise an essential element. *Id.* After this court identifies the essential elements of each charged offense, we must determine whether the elements of one of the challenged offenses could, hypothetically, be established by evidence that does not also establish the essential elements of the other charged offense. *Id.* at 454.

In the instant case, Bullitt was convicted of burglary and theft. Burglary is defined as the "break[ing] and enter[ing] the building or structure of another person, with intent to commit a felony in it." I.C. § 35-43-2-1. "A person who knowingly or intentionally exerts unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use, commits theft, a Class D felony." I.C. § 35-43-4-2. Clearly, the crimes of burglary and theft contain distinct elements and convictions of burglary and theft do not violate Indiana's statutory elements test. *See Vestal v. State*, 773 N.E.2d 805, 807 (Ind. 2002).

Where, as here, the statutory elements test does not disclose a double jeopardy violation, we turn to the actual evidence test. *Merriweather*, 778 N.E.2d at 454. Under that test, the actual evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts. *Id.* To show that two challenged offenses constitute the same offense under the actual evidence test, a defendant must show a reasonable possibility that the evidentiary facts used by the fact

finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense. *Id.*

Our review of the record indicates the facts tending to establish theft included Officer Nelson finding Leuer's watch and credit card on Bullitt's person without Leuer's permission. The burglary is supported, by a panel missing from the door to Leuer's house, a broken window, the door, that has a deadbolt at the base which can only be opened from the inside, unlocked, and a latent fingerprint on a broken piece of glass matched to Bullitt. Thus, there is no reasonable possibility that the same evidentiary facts were used to convict Bullitt of both burglary and theft.

Nonetheless, Bullitt argues his convictions of burglary and theft violate I.C. § 35-38-1-6 because theft is a lesser-included offense of burglary in this context. I.C. § 35-38-1-6 protects defendants charged with an offense and an included offense from being found guilty of both charges, as this is tantamount to convicting a defendant twice for the same conduct. An offense may be either inherently or factually included in another offense for purposes of the statute. *Merriweather*, 778 N.E.2d at 456. An offense is inherently included in another when it may be established by proof of the same material elements or less than all the material elements defining the more serious crime charged. *Id.* (citing IC 35-41-1-16(1); *Goudy v. State*, 689 N.E.2d 686, 697 (Ind. 1997); *Wright v. State*, 658 N.E.2d 563, 566 (Ind. 1995)). An offense is factually included in another when the charging instrument alleges the means used to commit the crime charged include all of the elements of the alleged lesser-included offense. *Id.* We have already

explained that the material elements of theft are not included in the material elements of burglary. Thus, theft is not a lesser-included offense of burglary in this instance.

IV. *Habitual Offender*

Lastly, Bullitt argues the State did not prove beyond a reasonable doubt he has accumulated two prior felony convictions. Specifically, Bullitt contends a person named James Bullitt was convicted of the two prior felonies proffered by the State, but that the State did not present sufficient identifiers to prove beyond a reasonable doubt the James Bullitt on trial in this case is the James Bullitt from the previous convictions. However, Bullitt provides neither authority nor cogent argument to support this claim. Accordingly, this issue is waived. *See* Ind. App. R. 46A(8)(a).

CONCLUSION

Based on the foregoing, we find (1) the trial court did not abuse its discretion by admitting evidence seized after Bullitt's detention by the police; (2) the trial court did not violate Bullitt's right to due process when it detained, admonished, and released a prospective juror; and (3) Bullitt's conviction for burglary and theft do not violate his protection against double jeopardy.

Affirmed.

KIRSCH, J., and FRIEDLANDER, J., concur.